Supreme Court, U. S.
FILED
NOV 16 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-335

ANDREW WILLIAMS,
Petitioner,

vs.

WILLIAM J. USERY, et al.,
Respondents,

and

FLORIDA SUGAR CANE LEAGUE, INC.,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE INTERVENOR, FLORIDA SUGAR CANE LEAGUE, INC., IN OPPOSITION TO THE PETITION FOR CERTIORARI

JOHN BACHELLER, JR.
CHARLES KELSO
FISHER & PHILLIPS
3500 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Intervenor, Florida Sugar Cane League, Inc.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

STATEMENT OF THE CASE 2

ARGUMENT AND CITATION OF AUTHORITY 7

Point One—The Immigration Act Does Not Require and the Secretary of Labor Is Not Authorized to Set an Adverse Effect Rate Which Will Make Cutting Sugar Cane "Attractive" to American Workers 7

Point Two—Setting the Adverse Rate According to Petitioner's "Attractiveness" Theory Would Have the Effect of Obviating the Need for Foreign Workers, Contrary to Congressional Intent in Establishing a Scheme Permitting Their Use and Contrary to Long-Established Agency Practice 11

Point Three—The Issue Which Petitioner Raises Involves Novel Interpretation of Long-Standing and Consistently Applied Departmental Regulations and Procedures Which Are in Accord With Congressional Intent. No Special or Important Reasons Exist Which Justify Granting His Petition for a Writ of Certiorari 13

CONCLUSION 14

Authorities Cited

Cases

Acupuncture Center of Washington v. *Brennan*, 364 F.Supp. 1038 (D. D.C. 1973), *aff'd*, ... F.2d ..... (D.C. Cir. 1976), *pet. for cert. filed*, 44 U.S.L.W. 3626 (U.S. April 15, 1976) (No. 75-1497) 13

Chemehuevi Tribe of Indians v. *F.P.C.*, 420 U.S. 395 (1975) 10, 13

Digilab, Inc. v. *Secretary of Labor*, 495 F.2d 323 (1st Cir. 1974) 13

The Elton Orchards, Inc. v. *Brennan*, 508 F.2d 493 (1st Cir. 1974) 3
Florida Sugar Cane League, Inc. v. *Usery*, 531 F.2d 299 (5th Cir. 1976) 1, 11
Golabeck v. *Regional Manpower Administration*, 329 F.Supp. 892 (E.D. Pa. 1971) 13
Massachusetts Trustees v. *United States*, 377 U.S. 235 (1964) 10
NAACP, Western Region v. *Brennan*, 360 F.Supp. 1006 (D. D.C. 1973) 4, 7
Ratnayake v. *Mack*, 499 F.2d 1207 (8th Cir. 1974) 13
Saxbe v. *Bustos*, 419 U.S. 65, 74 (1974) 10, 13
Seo v. *United States Department of Labor*, 523 F.2d 10 (9th Cir. 1975) 13
Shuk Yee Chan v. *Regional Manpower Administrator*, 521 F.2d 592 (7th Cir. 1975) 13
Thorpe v. *Housing Authority*, 393 U.S. 268 (1969) 11
United States v. *Midwest Oil Co.*, 236 U.S. 459 (1915) 10
Williams v. *Usery*, 531 F.2d 305 (5th Cir. 1976) 6, 7, 8

STATUTES

Immigration and Naturalization Act—
8 U.S.C. Section 1182(a)(14) 3, 12
8 U.S.C. Section 1184(c) 2, 3, 8, 12

REGULATIONS

8 CFR Section 214.2(h)(3) 2, 4
20 CFR Section 602.10, *et seq.* 2, 3, 4
29 CFR Section 60.6 3

MISCELLANEOUS

111 Cong. Rec. 24230-24231 (1965) 10
H. R. Rep. No. 1365, 82d Cong., 2d Sess. (1952) 12

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-335

ANDREW WILLIAMS,
Petitioner,
vs.
WILLIAM J. USERY, et al.,
Respondents,
and
FLORIDA SUGAR CANE LEAGUE, INC.,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE INTERVENOR, FLORIDA SUGAR CANE LEAGUE, INC., IN OPPOSITION TO THE PETITION FOR CERTIORARI

Intervenor, FLORIDA SUGAR CANE LEAGUE, INC., respectfully prays that the Supreme Court of the United States deny a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-styled case on May 10, 1976, reported at 531 F.2d 305. (*See also* companion case *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F.2d 299 (5th Cir. 1976).)

STATEMENT OF THE CASE

Each year during the peak winter harvest period in Florida, Intervenor's members find it necessary to import West Indian sugar cane cutters to harvest their crops. Under the Immigration and Naturalization Act (8 U.S.C. 1184 (c)) and regulations promulgated thereto (8 C.F.R. § 214.2 (h)(3) and 20 C.F.R. § 602.10, *et seq.*), these temporary foreign agricultural workers are permitted to enter and perform work in this country after it has been ascertained that their presence will not depress the wages of domestic harvest laborers in Florida. Despite the fact that cane cutter jobs pay a guaranteed minimum wage and average piece rate earnings higher than those prevailing in Florida, including those paid to citrus workers, and despite an extensive advertising and recruitment campaign throughout Florida and the Southeast United States, few American cane cutters can be recruited. Petitioner Migrant Legal Action Program, Inc. opposes even the concept of a foreign labor program and here seeks to have the Secretary of Labor directed to raise required wage rates far above prevailing wage rates until American workers claim all jobs and all foreign workers are eliminated. Petitioner's position is clearly contrary to Congress' purpose as set forth in the Immigration and Naturalization Act.

Regulatory Scheme

Under Section 1184(c) of the Act, and the regulations promulgated pursuant to it, the Attorney General of the United States is directed to establish the terms and conditions under which temporary workers may be imported after consulting with other agencies. The regulation, at 8 C.F.R. 214.2(h)(3), directs the Secretary of Labor to determine and certify to the Attorney General that domestic

workers are not available and that the importation of foreign workers will not adversely affect domestic workers similarly employed before the foreign cane cutters are permitted to enter the country. *See The Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493 (1st Cir. 1974).

In order to ensure that domestic workers will not be adversely affected by importation of temporary foreign workers, the Secretary of Labor has, by long-standing regulation, at 20 C.F.R. § 602.10, *et seq.*, required that employers who petition to obtain certification for foreign workers first offer the jobs to American workers at rates of pay which are sufficiently high to prevent an adverse effect on similarly employed domestic workers and continue to employ qualified Americans even after foreign workers have been employed.

Neither the statute nor the regulations establish any formula for computation of "an adverse effect rate," and accordingly, the determination of the "adverse effect rate" is addressed to the sound discretion of the Secretary. He annually determines for each state where temporary workers are likely to be requested, the hourly rates of pay which will be required in order to prevent a general reduction in wages for agricultural workers. The adverse rate determination for each year is tied to the average or the prevailing hourly wage rate actually received by the state's agricultural workers during the previous season, and the adverse rate is determined by a mathematical formula.

The statutory and regulatory scheme for certification of nonimmigrant temporary agricultural workers under 8 U.S.C. § 1184(c) is similar to the statute and regulations under which immigrant aliens are admitted permanently for the purpose of performing skilled or unskilled labor in the United States pursuant to 8 U.S.C. § 1182(a)(14) and the regulations issued thereunder at 29 C.F.R. § 60.6:

> [P]rospective employment offered in accordance with Section 60.3(c) will be deemed to *adversely affect 'wages' or 'working conditions'* of American workers within the meaning of Section 12(a)(14) of the Act *unless* it appears: (a) that such employment will be for the wage rates no less than those prevailing for U. S. workers similarly employed in the area of employment. . . . (Emphasis supplied.)

As described above, the regulation pertaining to certification of *temporary* foreign agricultural workers contains an identical requirement that "the employment of the beneficiary [the foreign worker] will not adversely affect the wages and working conditions of workers in the United States similarly employed. . . ." 8 C.F.R. § 214.2(h)(3) and 20 C.F.R. § 602.10(a). Therefore, in *NAACP, Western Region* v. *Brennan*, a case involving importation of temporary farm workers, the Court stated that:

> [T]he adverse effect rate should be set high enough to ensure that earnings of domestic workers are not depressed by the presence of foreign workers.

360 F.Supp. 1006, 1020 (D. D.C. 1973).

In the case of permanent immigrants, the Secretary of Labor has always issued the required certification if the rates at which the jobs were offered to American workers were no lower than the average, i.e., the prevailing, rates paid to workers in similar positions. In the case of temporary nonimmigrant sugar cane workers, the adverse rate has always been set slightly higher than the average rate paid to similarly employed domestic workers. Thus, under both systems, it is clear that the Secretary has always set the adverse effect rate at a level which is calculated in such a manner as to preclude any adverse effect on the wages paid to similarly employed American workers.

Wages of Sugar Cane Cutters

At present and during all pertinent times, Florida sugar cane workers' minimum guaranteed rate has been in excess of the average hourly rate being paid other Florida agricultural workers, including the rate paid to citrus workers. Thus, use of temporary foreign workers has never adversely affected the wages of domestic agricultural workers.

The Secretary used a mathematical formula to project the 1974-75 guarantee of $2.45 per hour for cane cutters based on the previous year's guaranteed minimum hourly rate for all Florida agricultural workers.

The 1974-75 harvest season wage rates were the rates on which the $2.84 per hour rate for 1975-76 was based. During 1974-75, sugar cane workers were paid a *guaranteed minimum* of $2.45 per hour plus free housing. At the same time the prevailing hourly rate for all Florida agricultural workers, including highly paid supervisors and machine operators, was $1.98 without room and board or $1.69 if free housing was provided. During the same period, the *average hourly piece rate earnings* based on incentive pay plans, was $3.03 per hour for sugar cane cutters (*excluding* supervisors and equipment operators) and $2.94 for all Florida agricultural workers (*including* higher paid supervisors and equipment operators). Because Florida sugar cane cutters are and always have been paid in excess of the prevailing hourly rate, it is clear that importation of temporary foreign workers has not had the effect of depressing farm wages in Florida or in other states where the Secretary of Labor has made these calculations.

The Brief of the Petitioner (*see* fn. 14) notes that sugar cane cutters' incentive piece rate earnings exceed

their minimum guaranteed hourly rate. When the guaranteed minimum was $2.45 per hour, the average incentive earnings were $3.03 per hour. When the Secretary increased the guarantee to $2.84, the incentive earnings increased to average $3.59 per hour.

It is, of course, not at all odd that piece rate incentive earnings exceed the guaranteed minimum, *i.e.*, the adverse effect rate. Petitioner simply misses the point that if the incentive rate is guaranteed, the purpose of having an incentive rate—to encourage production—is lost. The Court of Appeals, however, did not miss this point. *Williams* v. *Usery*, 531 F.2d 305, 308 (5th Cir. 1976).

At all times the adverse effect rate applicable to cane cutters has exceeded both the hourly guaranteed rates and the piece rates of all other Florida agricultural workers.

As noted by the Court below, with a minimum guaranteed hourly wage rate of $2.84, sugar cane cutters earn substantially more than do other Florida agricultural workers. Further, the fact that the presence of foreign workers cannot be said to affect adversely domestic workers' wages is even more abundantly clear when the average *actual* earnings of sugar cane cutters and other farm employees are compared. The average incentive piece rate results in average actual earnings for Florida agricultural workers of $3.49 per hour. That is ten cents per hour less than the average incentive piece rate of cane cutters whose earnings are $3.59 per hour.

It is undisputed that Florida sugar cane growers have in the past sought or that they continue to seek domestic employees. They have always offered pay rates above the prevailing rates paid to other Florida farm workers, but there are insufficient domestic workers in Florida during the peak winter harvest season who are willing to

harvest the cane. Because there are insufficient willing domestic workers, the growers must employ foreign workers. This is exactly the situation in which the Immigration and Naturalization Act authorizes the use of foreign workers.

By specifying that the minimum wage rate to cane cutters must be $2.84 per hour, clearly far higher than the rates averaged by Florida agricultural workers, the Secretary of Labor has met his duty to see that there is no adverse effect on other Florida agricultural workers.

ARGUMENT AND CITATION OF AUTHORITY

Point One

The Immigration Act Does Not Require and the Secretary of Labor Is Not Authorized to Set an Adverse Effect Rate Which Will Make Cutting Sugar Cane "Attractive" to American Workers.

The decision below is in accord with Congressional intent as expressed through statements of sponsoring legislators, agency enforcement and court interpretation of the Immigration Act and the regulations promulgated by the Secretary of Labor under the Act. The Fifth Circuit Court of Appeals held that the authority of the Secretary of Labor is limited to making an economic determination of what rate must be paid to all sugar cane workers in order to neutralize any adverse effect which might otherwise result from the influx of temporary foreign workers. *Williams* v. *Usery*, 531 F.2d 305, 306 (5th Cir. 1976), and no court has ever held otherwise. *See NAACP, Western Region* v. *Brennan*, 360 F.Supp. 1006, 1020 (D. D.C. 1973).

As stated by the *Williams* court, Petitioner Williams' notion that the adverse effect rate must be set higher and higher until American workers claim all sugar cane cutting jobs is a proposition well beyond the discretionary authority of the Secretary. The court distinguished the authority given to the Secretary to ensure against a lowering of wages from affirmative power to raise wages to make cutting sugar cane an irresistibly attractive job.

The standard followed by the Secretary in determining adverse wage rates has always been to select a wage rate which would guard against a general wage deflation because of employment of foreign workers.

By setting the adverse effect rate above the prevailing rate, which is the average hourly rate paid to Florida agricultural workers, the Secretary has always taken necessary steps to assure that importation of foreign workers has not depressed prevailing agricultural wage rates.

The Department's interpretation of its authority was approved by Congress when it amended the Immigration and Naturalization Act in 1965. At that time Congress debated whether Section 1184, the provision of the statute granting authority for admission of temporary foreign agricultural workers, still served a viable purpose, but a decision was made to keep the temporary foreign worker exemption in the Act. In fact, the legislative history reveals that the 1965 amendment in no way curtailed the right of Florida farmers to employ temporary foreign agricultural workers. On September 17, 1965, a colloquy took place on the Senate floor which establishes this fact conclusively:

> MR. KENNEDY of Massachusetts. The distinguished junior Senator from Florida [Smathers] . . . brought to my attention certain language that appears in the

> [Senate] report, pointing out to me that this was not the language that was agreed to by the Committee. Let me now read the language about which the Senator from Florida expressed concern:
>
> 'The attention of the Committee was directed to the situation which exists with reference to the practices and procedures controlling the importation of aliens to perform temporary services under Section 214(c) of the Immigration and Naturalization Act, both as it relates to the importation of actors and other performers and as it relates to other types of employment.
>
> 'The Attorney General will be requested to study this matter of consultation with the Secretary of Labor in those cases involving the importation of nonimmigrant aliens under Section 101(a)(15)(H)(i) and (ii) and report seasonably to the Committee the result of this study.' [Senate Report No. 748, 89th Cong., 1st Sess., *U. S. Cong. and Admin. News* 3345 (1965).]
>
> There is a clear understanding between myself and the junior Senator from Florida, and other members of the Committee with respect to this language that the Committee had no intention of including nonimmigrant farm labor in the language agreed to.
>
> I regret that this language is in such a form that it could be misconstrued and want to say very definitely now that the Committee makes *no change or reference to nonimmigrant farm labor* either in the report or the bill before us.
>
> The language that I have referred to is added to cover those temporary workers who accompany theatrical performers to assist them in their performances and again was not included to refer to nonimmigrant farm labor.

> MR. HART [Michigan]: I reassure the Senator from Florida that I heard the colloquy with respect to agricultural labor, and I share the view of the floor manager of the bill that *there is nothing*, in the new legislation which we hope will be enacted, *that would change existing laws or procedures with respect to the admission of migrants or anybody else. The same procedures and clearance requirements which exist today will remain after enactment of this bill.*

111 *Cong. Rec.* 24230-24231 (1965). (Emphasis supplied.)

Under established doctrines of this Court, the Department of Labor's interpretation of its authority should be upheld.

> Such long-standing administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched. Such a history of administrative construction and Congressional acquiescence may add a gloss or qualification to what is on its face unqualified statutory language. *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 12 L.Ed.2d 268, 84 S.Ct. 1236 (1964); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 59 L.Ed. 673, 35 S.Ct. 309 (1915).

Saxbe v. *Bustos*, 419 U.S. 65, 74 (1974). *See also Chemehuevi Tribe of Indians* v. *F.P.C.*, 420 U.S. 395, 409-10 (1975) ("The deference due this long-standing administrative construction [of its statutory authority] is enhanced by the fact that Congress gave no indication of its dissatisfaction with the agency's interpretation of the scope of its jurisdiction when it amended the Act. . . .")

In accordance with these principles of deference to agency expertise and familiarity with the Act and the

problems faced by both employers and workers, the Fifth Circuit rejected Petitioner Williams' "attractiveness" theory and approved the $2.84 per hour adverse effect rate for 1975. That determination was held to be a proper exercise of the Secretary's rule-making authority "reasonably related to the purposes of the enabling legislation" under *Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-81 (1969). *Florida Sugar Cane League, Inc.* v. *Usery*, 531 F.2d 299 (5th Cir. 1976).

Point Two

Setting the Adverse Rate According to Petitioner's "Attractiveness" Theory Would Have the Effect of Obviating the Need for Foreign Workers, Contrary to Congressional Intent in Establishing a Scheme Permitting Their Use and Contrary to Long-Established Agency Practice.

The remarks by Senators Kennedy and Hart which are reproduced above clearly show that Congress recognized the need for temporary foreign workers in agriculture and did not intend to change the procedures or clearance requirements under Department of Labor Regulations.

When Congress passed the Immigration and Naturalization Act in 1952, it was recognized that the temporary foreign agricultural workers would be needed at times. If Florida sugar cane growers offer wages at or above the prevailing wages for agricultural harvest work in Florida during the peak winter harvest season and, nevertheless, cannot obtain sufficient domestic workers, there is a demonstrated need for the importation of foreign workers to alleviate "labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified

production." H. R. Rep. No. 1365, 82 Cong., 2d Sess. (1952) 2 *U.S. Cong. and Admin. News* 1698 (1952).

By contrast, Williams' "attractive rate" argument would make a nullity of Section 1184 by forcing the Secretary of Labor to set wages higher and higher until, finally, enough American workers are willing to cut sugar cane (or until the American sugar industry is priced out of the world market). Clearly, that result was not intended by Congress when it directed the Attorney General to consult with appropriate agencies and permit entry of temporary workers. The Congressionally approved standards presently in effect are an accommodation of the interests of workers, employers and consumers and should not be set aside by judicial proceedings.

The language of the comparable Section 1182(a) (14) states specifically that the Attorney General is to certify that there are not sufficient American workers who are able, *willing* and qualified and available to do the work which an alien seeks to perform permanently. Thus, by analogy, the regulations issued by the Secretary of Labor pursuant to the provision dealing with temporary foreign workers recognizes that foreign workers may be required because Americans simply are not willing to perform certain types of work. The statutory and regulatory authorization to the Secretary of Labor is not to see that irresistibly attractive wages for cutting sugar cane are offered but rather to see that wages paid to foreign sugar cane workers do not depress agricultural wages. To hold otherwise would effectively repeal the statutory authorization for use of temporary agricultural workers.

Point Three

The Issue Which Petitioner Raises Involves Novel Interpretation of Long-Standing and Consistently Applied Departmental Regulations and Procedures Which Are in Accord With Congressional Intent. No Special or Important Reasons Exist Which Justify Granting His Petition for a Writ of Certiorari.

The decision of the Court of Appeals that the Secretary of Labor is without statutory authority to set wage rates for sugar cane cutting at whatever rate is high enough to attact American workers is in accord with the long-standing Department of Labor Regulations and with the Immigration and Naturalization Act of 1952, as amended. This Court has many times stated that great deference is due agency determinations of the scope of their statutory authority. *Chemehuevi Tribe of Indians* v. *F.P.C.*, 420 U.S. 395, 409-10 (1975); *Saxbe* v. *Bustos*, 419 U.S. 65 (1974). No Court has ever accepted Petitioner's novel theory and there is no conflict in interpretation of the statute or of the regulations among the circuits. While the precise issue has never been addressed previously, decisions by other courts involving application of departmentally determined adverse effect rates have upheld the Labor Department's theory rather than that of the Petitioner. *See, e.g., Acupuncture Center of Washington* v. *Brennan*, 364 F.Supp. 1038, 1041 (D. D.C. 1973), *aff'd*, ... F.2d ..... (D.C. Cir. 1976), *pet. for cert. filed*, 44 U.S.L.W. 3626 (U.S. April 15, 1976) (No. 75-1497); *Seo* v. *United States Department of Labor*, 523 F.2d 10 (9th Cir. 1975); *Shuk Yee Chan* v. *Regional Manpower Administrator*, 521 F.2d 592, 596 (7th Cir. 1975); *Ratnayake* v. *Mack*, 499 F.2d 1207, 1210, 1213 (8th Cir. 1974); *Digilab, Inc.* v. *Secretary of Labor*, 495 F.2d 323 (1st Cir. 1974); *Golabeck* v. *Regional Manpower Administration*, 329 F.Supp. 892, 895 (E.D. Pa. 1971) and cases there cited.

CONCLUSION

For all of these reasons, no Writ of Certiorari should issue from this Court to review the judgment of the Fifth Circuit.

Respectfully submitted,

JOHN BACHELLER, JR.

CHARLES KELSO
FISHER & PHILLIPS
3500 First National Bank Tower
Atlanta, Georgia 30303
Counsel for Intervenor, Florida Sugar Cane League, Inc.